

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEL JAY UGALINO,

Defendant and Appellant.

C063951

(Super. Ct. No.
05F07620)

"A jury found defendant Del Jay Ugalino guilty of the following crimes: (1) first degree residential burglary (Pen. Code, § 459); (2) attempted robbery of Joshua Johnson (Pen. Code, §§ 664, 211); (3) attempted robbery of Jessie Rider (Pen. Code, §§ 664, 211); (4) possession of a controlled substance for sale (Health & Saf. Code, § 11378); (5) possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)); (6) robbery of Bendon Lee (Pen. Code, § 211); (7) battery of Charles Maroosis (Pen. Code, § 242); and (8) making a criminal threat to Mickey Lathum (Pen. Code, § 422). The jury also found true the allegation that defendant personally used a handgun during the commission of the crimes set forth in (1) to (3), above.

Defendant was sentenced to an aggregate term of 14 years six months in state prison. [In a prior appeal to this court, he claimed] prosecutorial misconduct, ineffectiveness of counsel, and insufficiency of the evidence. We [reversed] defendant's conviction for attempted robbery of Jessie Rider and otherwise affirm[ed] the conviction." (*People v. Ugalino* (2009)

174 Cal.App.4th 1060, 1062 (*Ugalino*).)¹ We remanded the matter to the trial court "for the limited purpose of recalculating defendant's sentence in light of this court's decision to reverse the conviction on count three." (*Id.* at p. 1066.)

On remand, the trial court correctly expressed its intent to not exceed the 14-year-six-month sentence previously imposed. (See, e.g., *People v. Hanson* (2000) 23 Cal.4th 355, 357.) However, as part of its recalculation, the court ran *both* count seven (12 months) *and* count eleven (16 months) consecutive to the 18-month principal term (count two) and *concurrent only with each other*. This erroneously extends defendant's confinement 16 months, not the 12 months that the court intended.

The error does not appear on the amended abstract of judgment, which reflects a 14-year-six-month term purportedly consisting of one year six months (one-half the low term for the completed offense) for attempted first degree robbery (count two), 10 years for handgun use on count two, one year (one-third

¹ The facts of defendant's offenses are set forth in our published opinion and need not be repeated here. (*Ugalino, supra*, 174 Cal.App.4th at pp. 1062-1063.)

the middle term) for second degree robbery (count seven), and two years for the on-bail enhancement for terrorist threats (count eleven). Count eleven is listed simply as concurrent, even though the count and its enhancement are both consecutive to the principal term. A concurrent term on an unrelated case is also included.

Defendant was awarded 208 days' custody credit, 31 days' conduct credit, and 977 days' state prison credit. All previously imposed fines, penalties, and assessments were reimposed.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

We shall modify the judgment to impose a consecutive term on count eleven and its enhancement and stay the four months that exceed the sentence previously imposed. For clarity, count seven should be listed as concurrent with count eleven, and count eleven should be listed as consecutive. This avoids the oddity of a "concurrent" count eleven having a consecutive enhancement.

We also note a minor error on the amended abstract of judgment. In part 14 of the abstract, the box for "4019" should be unchecked and the box for "2933.1" should be checked.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to impose a consecutive term on count eleven and its enhancement. Four months of the 16-month term on count eleven are stayed. As so modified, the judgment is affirmed. The trial court is directed to prepare a second amended abstract of judgment, corrected to reflect that conduct credits were calculated pursuant to section 2933.1 and that count eleven is consecutive, not concurrent. The court shall forward a certified copy of the second amended abstract to the Department of Corrections and Rehabilitation.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.